Nos. 90-1266, 90-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE STATE OF MONTANA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The State of Montana submits this brief as *amicus curiae* in support of the petitions by the Environmental Protection Agency and the State of Arkansas, *et al.*, for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.[1]

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[1] Because this *amicus* brief is submitted by the Montana Attorney General on behalf of the State, it does not require the consent of the parties pursuant to Supreme Court Rule 37.5.

INTEREST OF THE AMICUS CURIAE

The State of Montana respectfully requests this Court to grant a writ of certiorari to review the decision by the United States Court of Appeals for the Tenth Circuit in *Oklahoma v. EPA*, 908 F.2d 595 (10th Cir. 1990). The primary issue presented by the Tenth Circuit's decision is the legal significance of the water quality standards of downstream states for the permit applications of out-of-state sources. By requiring such sources to strictly comply with downstream state standards, the Tenth Circuit adopted an approach that is inconsistent with the decisions of this Court and other courts. Hence, the Tenth Circuit's decision threatens to cause tremendous confusion about the applicable standards in permitting decisions and disrupt the planning process for new industrial and municipal facilities.

Montana is one of the States that may be significantly affected by the Tenth Circuit's decision. Numerous streams and rivers flow from Montana into adjoining states, and most industrial and municipal dischargers in the State are located along interstate waterways or tributaries of such waterways. These facilities have received discharge permits based on their compliance with the federally-approved water quality standards of Montana. The Tenth Circuit's decision imposes substantial uncertainty and risk for both public and private dischargers in the State of Montana, particularly to the extent that one or more downstream states adopt stricter water quality standards than Montana's own federally-approved standards.

The Tenth Circuit's decision will also disrupt, in varying degrees, the National Pollutant Discharge Elimination System (NPDES) permitting program of Montana and other states. Montana has been delegated the authority to issue Montana Pollutant Discharge Elimination System (MPDES) permits by the U.S. Environmental Protection Agency (EPA) under the Clean Water Act

(CWA). CWA § 402(b), 33 U.S.C. § 1342(b). The Tenth Circuit's decision will require Montana's permitting agency, the Department of Health and Environmental Sciences, to carefully survey downstream state water quality standards and to apply these standards as well to permit applications involving proposed discharges to interstate waterways. In general, the increased complexity and informational requirements resulting from the Tenth Circuit's decision will impose major new administrative burdens on states with approved permitting programs such as Montana's.

The State of Montana therefore strongly urges this Court to grant certiorari and resolve the conflict on the extraterritorial reach of downstream state water quality standards to out-of-state facilities.

STATEMENT

This case involves the NPDES permit issued by EPA to a new municipal wastewater treatment plant in the City of Fayetteville, Arkansas. EPA had issued the permit based on a finding that the proposed discharge from the Fayetteville facility would have no detectable impact on the water quality of the downstream state of Oklahoma. 908 F.2d at 632. The Tenth Circuit overturned EPA's decision to approve the permit. The court held that an out-of-state facility was required to comply strictly with the water quality standards of all downstream states. *Id.* at 615.

Moreover, the court also held that the permitting agency for the source state has no flexibility in interpreting and applying the water quality standards of a downstream state. *See id.*, at 615-20. Here, the Tenth Circuit concluded that the Fayetteville permit must be denied because it would violate Oklahoma water quality standards, even though the court did not disturb EPA's finding that the proposed discharge would have no detectable effect on Oklahoma water quality. *Id.* at 632.

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE CONFLICT BETWEEN THE HOLDING OF THE TENTH CIRCUIT AND THE DECISIONS OF THIS AND OTHER COURTS ON THE EXTRATERRITORIAL APPLICATION OF STATE WATER QUALITY STANDARDS.

The Tenth Circuit's holding on the extraterritorial application of state water quality standards is inconsistent with the result reached in every other case where this issue has been presented. In particular, two decisions by this Court have strongly endorsed the principle that one state cannot regulate sources in an adjoining state. In *City of Milwaukee v. Illinois*, 451 U.S. 304, 328 (1981), this Court concluded that a state could adopt water quality standards that were stricter than the federal criteria, but could only apply those standards to in-state dischargers. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court made its views unequivocally clear that a downstream state could not block an out-of-state permit.

> While source States have a strong voice in regulating their own pollution, the CWA contemplates a much lesser role for States that share an interstate waterway with the source (the affected States). Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders. . . . [A]n affected State does not have the authority to block the issuance of the permit if it is dissatisfied with the proposed standards. . . . Thus the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program.

Id. at 490-91.

Other courts have reached the same conclusion. The Seventh Circuit concluded that applying a downstream state's water quality standards or common law against an out-of-state facility "would lead to chaotic confrontation between sovereign states." *Illinois v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). Such a rule would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water." *Id.* The Tennessee Supreme Court issued a similar decision in a case in which Tennessee was trying to apply its water quality standards to regulate a discharge in North Carolina. *Tennessee v. Champion Int'l Corp.*, 709 S.W.2d 569 (Tenn. 1986), *remanded*, 479 U.S. 1061 (1987). The court held that each state "clearly operates within the sphere of its own jurisdiction, and may not . . . control points of discharge lying within the jurisdiction of other states." *Id.* at 574.

These decisions by this Court and several lower courts established a uniform rule that a downstream state cannot regulate out-of-state dischargers. The Tenth Circuit's decision now creates a new conflict on this issue. It directly contradicts the conclusions reached by other courts in holding that an out-of-state source must strictly comply with the water quality standards adopted by a downstream state. Review by this Court is needed to resolve this conflict and definitively clarify the extraterritorial applicability of state water quality standards.

II. THE CONFUSION CREATED BY THE TENTH CIRCUIT'S HOLDING WILL DISRUPT STATE PERMIT PROGRAMS AND CAUSE MAJOR UNCERTAINTIES FOR EXISTING AND NEW DISCHARGERS.

The confusion created by the Tenth Circuit's novel holding on the interstate application of water quality standards is potentially very disruptive for both permitting agencies and permit applicants. The petitions filed by EPA and the State of Arkansas describe the

disruption that the Tenth Circuit's decision will cause for affected states. Based on the clear guidance provided by the existing case law prior to the Tenth Circuit's decision, states had issued permits, and dischargers had constructed their facilities, to comply with the water quality standards of the source state only. The Tenth Circuit's decision now creates substantial doubt about whether permits must also ensure compliance with downstream state water quality standards.

For Montana, the Tenth Circuit's ruling will require continual monitoring and review by agency staff of the water quality standards of downstream states. More importantly, if any downstream state adopts a very strict standard for a parameter such as phosphorus, the administrative workload in determining whether the facility under application for a MPDES permit or MPDES permit renewal can meet the standard will increase dramatically. The effect on the facility under review could range from permit denial to significant and limiting conditions on both the method and rate of discharge from the facility. Finally, the uncertainty about having to meet downstream state water quality standards also adversely affects the public and private holders of discharge permits in Montana because normal business planning requires predictability about the applicable standards that must be met.

Given the clear conflict between the decision of the Tenth Circuit and the decisions of other courts, including this Court, states and dischargers will have no clear guidance about whether downstream state standards are to be applied to regulate out-of-state sources. This confusion and the harm it may create can only be avoided if this Court grants certiorari and once and for all clearly defines the extraterritorial applicability of state water quality standards.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the Tenth Circuit.

Respectfully submitted,

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